

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3
4 **IN RE: VALSARTAN PRODUCTS**
5 **LIABILITY LITIGATION**

CIVIL ACTION NUMBER:

19-md-02875

6 **STATUS CONFERENCE via ZOOM**

7 Mitchell H. Cohen Building & U.S. Courthouse
8 4th & Cooper Streets
9 Camden, New Jersey 08101
February 23, 2023
Commencing at 2:00 p.m.

10 **B E F O R E:**

THE HONORABLE ROBERT B. KUGLER
UNITED STATES DISTRICT JUDGE

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12 **A P P E A R A N C E S:**

13
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For the Plaintiffs

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18 HONIK LLC
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For the Plaintiffs

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24 Proceedings recorded by mechanical stenography; transcript
25 produced by computer-aided transcription.

A P P E A R A N C E S (Continued) :

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For the Defendants, Prinston Pharmaceuticals,
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GREENBERG TRAURIG LLP
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For the Defendants, Teva Pharmaceutical Industries Ltd.,
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ALSO PRESENT:

LORETTA SMITH, ESQUIRE
Judicial Law Clerk to The Honorable Robert B. Kugler

Dave Bruey, Courtroom Deputy

1 (PROCEEDINGS held via Zoom before The Honorable
2 ROBERT B. KUGLER at 2:00 p.m.)

3 THE COURT: I got a letter from Ms. Davidson
4 (Miller).

5 Ms. Davidson (Miller), what do you want me to call
6 you? I don't know what the parents is.

7 MS. DAVIDSON: Would you like an explanation, Your
8 Honor?

9 THE COURT: Sure, if you want to give me one. If you
10 don't, that's fine.

11 MS. DAVIDSON: I'm in the course of changing my last
12 name. And I just don't want people to be confused, so I was
13 just going to leave the old one for a while, for like a month,
14 during the transition period.

15 THE COURT: Okay. Fine.

16 MS. DAVIDSON: Great question.

17 THE COURT: Fine, fine, fine.

18 All right. I got your letter. I'm not sure I
19 understand what the problem is. I mean, I understand you're
20 going to file the appeal on the class action. That's fine. I
21 mean, we'll see what the Third Circuit does.

22 If they disagree and say there shouldn't be any
23 classes, well, then I guess we send all the cases back to the
24 Panel, just go back to the various districts at that point as
25 individual cases.

1 But as I understand the trial that we've scheduled to
2 come up, there's three defendants and really one plaintiff, so
3 what is the issue here?

4 MS. DAVIDSON: Your Honor, the issue is that now that
5 a class has been certified, under the rules of one-way
6 intervention, a named plaintiff can't try a case outside the
7 class context. So the only class that can -- trial that can
8 go forward now would be a class trial. And a class trial
9 can't go forward until there's notice and opt-out.

10 So right now we're sort of prepping for a trial that
11 can't happen. And, for example, like damages, expert reports
12 are coming up, and the damages that we had instructed our
13 experts to respond to were, you know, MSP damages.

14 But now that there's a certified class, any trial
15 would involve the entire class, which is a whole different can
16 of worms in terms of damages reports.

17 So because we can no longer have a single plaintiff
18 trial in light of the class certification order, we sort of
19 feel stuck, and we have all these upcoming deadlines for a
20 trial that is no longer feasible.

21 The other problem, Your Honor, is that in order to
22 have a class trial, we would obviously have to have notice and
23 opt-out first. And realistically, that can't happen by June.

24 THE COURT: Well, I agree, we're not going to have a
25 class trial, but I've said all along we're not going to start

1 with class trials.

2 Who wants to speak for the plaintiffs?

3 MR. HONIK: Your Honor, I guess I can start.

4 I want to start by agreeing in some respects with
5 what defense counsel has said.

6 I think in view of Your Honor's ruling on our class
7 cert motion, that we have an obligation currently to submit to
8 Your Honor for review and approval a notice program and a
9 60-day opt-out period.

10 I think we also agree with them that one-way
11 intervention and pretty clear Third Circuit precedence
12 suggests that a trial going forward of any class member that
13 you've now certified -- and certainly MSP is not only a member
14 but identified as a class rep in your ruling -- needs to
15 proceed on a class-wide basis.

16 So I think it's well within your purview to manage
17 that in whatever way you think is most efficient, but the
18 reality is that I don't think we can proceed in June because
19 we need to give the now certified classes an opportunity to
20 obtain notice and opt out.

21 So I think we can stick with Your Honor's plan. I
22 just think at the least it needs to be deferred out into --
23 for sufficient time to have an opt-out period.

24 THE COURT: Well, we can't really manage that until
25 the appeals are filed and decided. Right?

1 MR. HONIK: I'm not sure that's entirely correct. I
2 don't know that the Third Circuit needs to weigh in
3 definitively on the 23(f) petition which have now been filed
4 as of last night.

5 I think certainly we can continue to prepare for a
6 trial. And in the absence of a direction from the Third
7 Circuit, I think it's appropriate to have a trial, a
8 class-wide trial.

9 THE COURT: But that's 60 days opt out -- so that's
10 at least 90 days away. Right?

11 MR. HONIK: I agree. I think -- we did some
12 calculating, and I think at the earliest, you know, we could
13 probably get a class trial ready, by about middle/end of
14 September.

15 MR. SLATER: And, Judge, I'll just add that --
16 because Rubin talked about the fact that you can manage the
17 class any way you want.

18 We certainly don't think that you need to try all of
19 these classes in one trial.

20 I read the 23(f) petition, and it seems to be getting
21 suggested that the plan is to have every single subclass in
22 one trial. We're certainly not asserting that. We certainly
23 believe that Your Honor could -- frankly, with the parties
24 that have already been identified -- structure a trial for the
25 claims that are within the purview of those -- that plaintiff

1 and those defendants utilizing the subclasses.

2 So we just want to make sure that we say that, that
3 we think you have a tremendous amount of discretion in how you
4 manage and deal with the class as you move forward.

5 MR. OSTFELD: Your Honor, Greg Ostfeld for
6 defendants.

7 I think I understand the suggestions from both
8 Mr. Honik and Mr. Slater, but we would respectfully disagree
9 both from the standpoint of efficiency and practicality.

10 From an efficiency standpoint, by the time notice
11 goes out, we'll probably know from the Third Circuit whether
12 they're taking the appeal or not. But there are -- obviously,
13 Your Honor ruled as you ruled, and you believe you got the
14 ruling right. And the Third Circuit will have an opportunity
15 to weigh in.

16 If the Third Circuit disagrees, an enormous amount of
17 time and energy could be expended on notice, preparing for
18 trial, taking the case for trial before there's any
19 opportunity -- or possibly to have to simply reinvent the
20 wheel afterwards.

21 Until notice goes out, there can't even be action on
22 things like dispositive motions because of the one-way
23 intervention problem, probably there can't be action on
24 Daubert motions because we don't know who's opting out yet.

25 And with respect to Mr. Slater's suggestion, the

1 problem I would note is a class representative can only try
2 its claims once.

3 So even if you limited this just to MSP, it would
4 have to try all of its claims in one trial, and it is the
5 representative for a series of TPP subclasses for which all of
6 the defendants, at least all the TPP trial defendants are --
7 excuse me, all of the TPP defendants are defendants. So it
8 couldn't just be the three defendants you're currently
9 contemplating for trial, it would need to be all of the
10 defendants that MSP is suing.

11 THE COURT: Okay.

12 MS. DAVIDSON: If I could just add, Your Honor, a few
13 points.

14 Adam, Mr. Slater talked about, you know, you could
15 just fashion this any way you can, but, I mean, the reality of
16 Rule 23 is that you certify a case, you're certifying it for
17 trial. And so the trial would have to include the entire TPP
18 class against all the defendants who the class was certified
19 against.

20 And the other thing I wanted to note, Your Honor, is
21 that the Third Circuit has recognized that, as you intimated
22 correctly, that you don't go forward with notice while a 23(f)
23 is pending. Right? Because then what happens? You give
24 notice to the class members -- and assuming review is granted,
25 then the notice has to be retracted.

1 So 23(f) does usually proceed more quickly than your
2 typical Third Circuit appeal. And it doesn't make any sense
3 to do notice until you know whether the Third Circuit is
4 granting the appeal or not -- granting the permission for
5 leave. Right? It's a two-step process.

6 MR. HONIK: Your Honor --

7 MS. DAVIDSON: I wasn't --

8 MR. HONIK: -- I'm unaware of such jurisprudence. I
9 don't say it's impossible. I'd certainly like to see such
10 evidence of that.

11 I think we've got an affirmative obligation to
12 undertake notice. I don't think we're permitted to sit on our
13 hands in view of the ruling. I think both the TPP and the
14 economic consumer classes as well as the medical monitoring
15 class members need to be apprised of the ruling, and there
16 needs to be a period to opt out.

17 And the very idea that this entire MDL litigation
18 should grind to a halt until the Third Circuit acts I think is
19 incorrect.

20 And I know from firsthand experience, I had a matter
21 that concluded just this past year in the First Circuit where
22 the First Circuit didn't act on a 23(f) for I think about 16
23 months.

24 And so the idea of this very mature litigation that
25 you've been managing for four years at this point, or almost,

1 grinding to a halt is just a preposterous proposal.

2 There are concerns about one-way intervention, but
3 that doesn't mean that Your Honor can't and shouldn't in this
4 roughly 90-day period where we will notice the classes, that
5 you can't entertain Daubert, that you can't entertain
6 dispositive motions, that you can't move the litigation
7 forward so that we don't have downtime.

8 I dare say the other thing we ought to do to address
9 the concerns of the defendants that there may be other
10 defendants implicated is to get them on board and have them
11 produce reports just like ZHP has done.

12 So we recognize the challenge, small C, that we may
13 be a couple months back in our schedule and not having the
14 desired June trial, but there's no reason on earth that we
15 can't have a September trial following an appropriate notice
16 period.

17 We've already begun to price out the program for
18 notice. It's not inexpensive, but it's not prohibitive. If
19 this were a settlement class and we had to direct notice based
20 on, you know, retailer information about consumers, that could
21 get expensive.

22 But we're prepared to trigger notice. We believe the
23 class deserves to be apprised of Your Honor's ruling. And I
24 think that we can make very effective use of these next
25 several months to get everything teed up so that when we get

1 past the opt-out period, we'll be in a position to try a case.

2 MS. DAVIDSON: Your Honor, if I may.

3 THE COURT: Hang on a minute. I have a question.

4 MS. DAVIDSON: Sure.

5 THE COURT: Do you agree with Ms. Davidson's
6 suggestion that what we're facing now, whatever it is -- let's
7 assume by your optimistic reasoning that somehow the Third
8 Circuit doesn't disturb anything and we're ready to go
9 sometime in September, this is going to be all plaintiffs and
10 defendants in the TPP matters at the same time?

11 MR. HONIK: I don't agree. I agree with what Adam
12 suggested, which is that now that we have a certified class,
13 and once we get past notice and an opt-out period, you have
14 multiple trial management tools at your disposal as an MDL
15 judge to try such fewer claims or fewer defendants as Your
16 Honor believes is appropriate. And there are I think
17 arguments on both sides to suggest that it should be bigger or
18 smaller.

19 We took some guidance from you, Judge, that I think
20 we wanted to take a smaller bite. And I think it's perfectly
21 within your purview to order a class trial, represented by MSP
22 in a courtroom, as to such trials as Your Honor thinks should
23 go.

24 So you had suggested and we agreed that it should be
25 all the claims brought by MSP, which is to say all the TPP

1 claims, the two warranty claims, the statutory, you know,
2 claims, unjust enrichment and the like. All of that can be
3 tried, and MSP can be in the courtroom representing the TPP
4 class, period. That can be managed very ably in a trial,
5 whether it's in September or October. That can absolutely be
6 done. And it would be proper for Your Honor to do that.

7 THE COURT: Ms. Davidson, go ahead.

8 MS. DAVIDSON: Okay. Thank you, Your Honor. A
9 couple things.

10 First of all, we have another named plaintiff, MADA,
11 so the Maine Automobile Dealers Association. It's unclear to
12 me if plaintiffs are trying to drop them as a named plaintiff,
13 but obviously they would be in the trial.

14 Secondly, Your Honor, the class was certified against
15 all defendants, so I really -- I understand that judges have
16 discretion with respect to trial management to some extent,
17 but it sounds like some sort of claim splitting they're
18 proposing.

19 The class was certified as to all defendants. It
20 wasn't separate certifications, so that is one class, and to
21 me it's one trial.

22 Also, Your Honor, court after court after court has
23 held that you don't issue class notice while 23(f) is pending.
24 When we file our motion for stay, I will include 10 to 15 case
25 cites to that effect. It is widely recognized that it's

1 wasteful, confusing, and risky. The Manual for Complex
2 Litigation says not to do it. So I'm just surprised to hear
3 plaintiffs saying that, because it is well established that
4 while a 23(f) petition is pending, courts do not issue notice.

5 And the last thing I want to say is that I believe
6 Mr. Honik said something about Your Honor entertaining Daubert
7 and MSJ rulings, but that cannot be done before notice and
8 opportunity to opt out, because the whole idea of one-way
9 intervention is class members can't sort of stand around and
10 see how the wind is blowing and then decide if they're in or
11 out. Like oh, there's Daubert rulings and there's MSJ
12 rulings, they're going one way or the other, that's going to
13 affect opt-out. The whole idea of one-way intervention is
14 like you're either in or out before you know which way the
15 wind is blowing in the court.

16 I don't know --

17 MR. HONIK: I completely agree with that, Judge.

18 MS. DAVIDSON: You interrupted me.

19 MR. HONIK: I suggested that it could be briefed,
20 that these matters could be briefed during this period. I'm
21 not suggesting the Court should rule. In fact, it should not
22 rule. It is a contravention of the one-way intervention rule.
23 But it doesn't mean that you can't order the parties to tee
24 the motions up so that they're briefed and available to Your
25 Honor so that you can rule on them before the trial.

1 The second point I would make, we're not trying to
2 dodge MADA's participation. If they are to be in the case,
3 that's fine, they can be in the case. Those are the two class
4 reps that you identified.

5 And to highlight a point that Adam made months and
6 months and months ago, suggesting that we ought to have a
7 sequence of trials, I think that's exactly what Your Honor
8 should do. I think trial one should be ZHP, and I think we
9 ought to get the other defendants in line directly behind them
10 with -- in the months running up to it, getting their damages
11 reports, their expert reports, just exactly as ZHP has done.

12 I don't disagree with the concept that with certified
13 classes against, quote, all defendants that they ought to get
14 in a queue. I only suggested it's well within your discretion
15 and management tool to try them sequentially. And that's
16 something that Adam and the plaintiffs had proposed months
17 ago.

18 MR. OSTFELD: Your Honor -- I'm sorry.

19 THE COURT: Hold on.

20 Ms. Davidson, you just mentioned you're going to make
21 a motion to stay.

22 Is that coming soon?

23 MS. DAVIDSON: Yes, Your Honor. Probably tomorrow or
24 Monday.

25 THE COURT: That's fine. That may be one way to tee

1 up these legal issues, by starting out with a motion to stay.

2 And you say you're going to cite all these cases as
3 to why I should not delve into cross-notice and all those
4 kinds of things at this stage. Right?

5 MS. DAVIDSON: Yes, Your Honor.

6 THE COURT: Well, why don't we do this then. If
7 you're going to file that in the next couple days, and I
8 assume the plaintiffs will respond with, I don't know, 10 days
9 or whatever you want to do.

10 We have scheduled already in court in April -- April
11 26th. Let's leave that on for in court. But I want to
12 make -- I'll make some decisions on where we're going from
13 here before then.

14 So defense will file the motion for the stay by the
15 27th of February. That's Monday.

16 You can do that?

17 MS. DAVIDSON: Yes, Your Honor.

18 THE COURT: Okay. Let's get a response from the
19 plaintiffs then by March 13th. That will give you two weeks.
20 Okay?

21 MR. HONIK: Yes, sir.

22 MR. SLATER: That works.

23 THE COURT: And then what we can do is how about
24 March 29th in court we'll discuss that -- those motions and
25 where we're going from there. Let's make it at 1:00 p.m.

1 Okay?

2 MR. HONIK: Yes.

3 THE COURT: And then we'll decide where we're going
4 from there once I have the chance to read your briefs.

5 MR. OSTFELD: Your Honor, respectfully, there are a
6 number of deadlines on the calendar that are coming up between
7 now and March 29th that could very well be affected by Your
8 Honor's determination with respect to a stay, including --
9 Daubert motions, damages report disclosures, dispositive
10 motions are all on the calendar.

11 Could those dates be held in abeyance pending the
12 March 29th ruling?

13 THE COURT: Yeah. We'll set new dates March 29th.

14 I've got to tell you, though, I'm not convinced that
15 we can't do Daubert. I understand the motions for summary
16 judgment, the one-way intervention problem and that, but
17 Daubert I don't think is in that category. But we'll decide
18 all that.

19 So let's decide all those things then March -- at the
20 end of March then, March 29th, as to what the new deadlines
21 are going to be, depending on where we go from there. Okay?

22 MR. SLATER: The only thing I would say, Judge, is --
23 and I was going to say it before you spoke -- we have no
24 problem with moving the deadline for some period on the
25 Daubert briefs which are due Monday, but I'm not sure that we

1 need to put them out that far, because I don't think that
2 filing the Daubert briefs treads on one-way intervention.

3 I just would like to make sure we at least get that
4 moving, because that's one piece that the parties are probably
5 pretty close to being done. Again, I have no problem moving
6 it few weeks. In fact, there's people on our team that have
7 said to me, if you can get us more time -- and I'm sure the
8 defense feels the same way -- nobody would weep. But I don't
9 know how everybody feels about that, to just move that
10 deadline a little bit.

11 THE COURT: What's your proposal?

12 MS. DAVIDSON: If I could respond to that, or --

13 THE COURT: Yeah, sure.

14 MS. DAVIDSON: So actually, our briefs are done, so I
15 think my paralegal would kill me for saying I don't think we
16 should file them.

17 But the concern I have is that with the certified
18 class, there are other defendants at stake, and I think they
19 should have a say into the Daubert briefing. I agree that
20 filing the briefs doesn't create a one-way intervention
21 problem, but I am concerned about the fact that we now have a
22 certified class and we have some defendants. And I can give
23 an example. For example, Mylan and other defendants who are
24 not in this trial as it was originally envisioned but are
25 defendants in the certified class and have very strong

1 feelings, as Your Honor may know, if you looked at the Third
2 Circuit filings, Mylan didn't even join our 23(f). Mylan and
3 Aurobindo did their own 23(f) petition because they have their
4 own issues that they want to raise. So that is my concern
5 about having Daubert motions at this point on behalf of just
6 three defendants.

7 I feel like as liaison counsel I have a duty to make
8 that point.

9 THE COURT: Well, unfortunately, they're not here at
10 the moment being represented, so we can't hear from them, but
11 I understand your point. And they do have some obligation to
12 let us know that they're concerned about this.

13 So, Mr. Slater, do you have a proposed list of when
14 you want to change these dates to?

15 MR. SLATER: I was going to propose to push it out a
16 couple weeks, the filing date of the Daubert.

17 THE COURT: I don't have a problem with that.

18 I mean, if, Ms. Davidson, you want to file what
19 you've got done, that's fine. You want to send that in,
20 that's fine. But if you want to give me proposed dates to
21 finish this up, that's fine. I'll listen.

22 MR. SLATER: I was going to offer March 13th --
23 that's actually the same date -- that's two weeks out, so --
24 that our opposition is due to the state motion, but I don't
25 think that will cause any problem, so we're fine with filing

1 our briefs then.

2 THE COURT: Okay. Sure.

3 MR. SLATER: Thank you, Judge. I appreciate that.

4 THE COURT: Yep. No problem.

5 Okay. A fine mess we're in, but we'll get it
6 straightened out.

7 MR. SLATER: This is the life we chose.

8 THE COURT: You'd rather be pitching baseballs, I'm
9 sure.

10 LAW CLERK: At the risk of, you know, asking
11 plaintiffs to do more, just a little more, could you please
12 send a letter clarifying what dates you are asking for from
13 this meeting. I know there will be a transcript, but it would
14 just be lovely --

15 MR. SLATER: Sure.

16 LAW CLERK: -- to have it on the docket.

17 MR. SLATER: No problem. The letter is going to say
18 March 13th for the initial briefs and then to just push out
19 the deadlines commensurate with what the deadlines already
20 were in terms of dates so that we don't have to figure --
21 we'll take a look and figure out what those dates are, and I
22 can put them right in a letter. Happy to do it.

23 LAW CLERK: Why don't you. Then maybe Judge Kugler
24 could issue a new or an amended case management order to make
25 it clear.

1 MR. SLATER: Will do. You'll have it today.

2 THE COURT: Okay. Mr. Ostfeld?

3 MR. OSTFELD: Your Honor, I'm sorry, because I'm
4 afraid I may be confused at this point.

5 My understanding is it's -- the Daubert motions are
6 being pushed out, the other dates are being held in abeyance
7 until you rule on the motion to stay?

8 THE COURT: Well, unless somebody tells me there's
9 some other date that needs to be pushed out -- I mean, needs
10 to be met, yes.

11 MR. OSTFELD: Okay. Thank you, Your Honor.

12 MR. SLATER: I can put that in the letter too if
13 that's helpful, just to confirm that that was the discussion.

14 THE COURT: Yep.

15 MR. HONIK: And Loretta, we'll confirm 2/27 for the
16 stay motion, 3/13 for plaintiff's response to the stay motion,
17 and 3/29 at 1:00 p.m. for an in-person audience with the Judge
18 in court.

19 LAW CLERK: Thank you.

20 THE COURT: That's it. Okay, everybody. Unless
21 there's something else, I'll let you go.

22 RESPONSE: Thank you, Your Honor.

23 MS. DAVIDSON: Thank you so much for seeing us on
24 such short notice, Your Honor.

25 THE COURT: You're welcome. We're going to get it

1 figured out. Don't worry it. We'll get there, folks.

2 MR. SLATER: We always do, Judge. One way or the
3 other, you always get there.

4 THE COURT: Thank you. See you guys.

5 (Proceedings concluded at 2:25 p.m.)

6 - - -

7 I certify that the foregoing is a correct transcript
8 from the record of proceedings in the above-entitled matter.

9
10 /S/ Ann Marie Mitchell, CCR, CRR, RDR, RMR
11 Court Reporter/Transcriber

12 24th day of February, 2023
13 Date

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